

THE JURY, THE LAW, AND THE PERSONAL INJURY DAMAGE AWARD*

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A few years ago Professor Jaffe in one of his customarily wise and urbane articles¹ observed: "I suggest that the crucial controversy in personal injury torts today is not in the area of liability but of damages." I think he is right on several counts. First, the criticism of personal injury awards today is at least as much concerned with their level as with their frequency. Second, it is my impression that on the bar's view the difference between lawyers—at least plaintiff lawyers—is measured more in terms of what they would get in a given case than it is in terms of winning or losing. Again, as a matter of simple arithmetic there is of course a greater difference between a \$30,000 and a \$10,000 verdict than there is between a \$10,000 one and a verdict for the defendant. And finally to pick up the point Professor Jaffe was most concerned with—it is selecting the appropriate award level that is the most troublesome issue in proposals to shift areas of tort to strict liability compensation schemes.²

Professor Jaffe went on in the passage quoted to wonder why damages received so little attention in law school study and in the secondary literature on tort.³ "Questions of liability," he continued, "have great doctrinal fascination. Questions of damage—and particularly their magnitude—do not lend themselves so easily to discourse. Professors dismiss them airily as matters of trial administration. Judges consign

*This article owes a major debt to the work of several colleagues on the jury project; in particular, to Fred Strodtbeck, Hans Zeisel, Dale Broeder, and to Allen Barton, Saul Mendlovitz, Rita James, and Philip Ennis. Their work will in the reasonably near future be published in its own right. The debt is to the stimulus of innumerable discussions as well as to their data.

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¹ Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219, 221 (1953).

² Professor Jaffe's principal point is that there is a serious tension today between the drive on the one hand to extend liability coverage and the drive on the other to make damages increasingly comprehensive and "civilized." This tension is vividly illustrated in the current controversies over FELA. Here it is recognized on both sides that the employees have for the moment the best of two possible worlds—a de facto strict liability system combined with common law jury damages. It is also the point of Professor Morris' shrewd remark that if an auto compensation plan finally comes it will be as a result of its sponsorship by defendants. MORRIS, TORTS 374 (1953). See also the handling of the award level in EHRENZWEIG, FULL AND INSURANCE FOR THE TRAFFIC VICTIM (1954) and Kalven, Book Review, 33 TEXAS L. REV. 778 (1955).

³ The point is perhaps no longer quite so true as it once was. The Shulman-James and Smith-Prosser casebooks do have sections on damages. The recent Harper and James treatise on torts devotes a full chapter to it.

them uneasily to juries with a minimum of guidance, occasionally observing loosely that there are no rules for assessing damages in personal injury cases. There is analogy for this situation in Jerome Frank's complaint that fact finding, though of paramount importance, is neglected by teachers who devote themselves too exclusively to appellate law. This may reflect not so much their judgment of relative importance (as Judge Frank supposes) as the relative adaptability of the subjects to conceptualization. And so it probably is with the subject of damages."

Once again I think he is right. And I would add only this—the reason the law of damages escapes ready conceptualization is because it is so pre-eminently jury law. Damages even more than negligence itself is law written by the jury. I would suggest therefore that it is the absence of data as to jury behavior on damage issues which places an important topic generally beyond our reach.

The purpose of this comment is not to supply the necessary data. The Jury Project at the University of Chicago Law School has for several years now been studying the jury empirically.⁴ It has progressed far enough to reaffirm that the jury's handling of damages is an extraordinarily interesting topic. It has also progressed far enough to realize that it would take a full life time of empirical research to document the many nuances in this corner of jury "law". In any event the project will within the next year or so begin to publish the results of its inquiries and I shall not attempt to report them in any substantial way here. I should like therefore to essay no more than a few reflections on the topic, in part engendered by my over-all experience with the project materials and in part by my experience in teaching torts. And in so doing I shall frequently step well beyond the project data and indulge in speculation.

This comment then will consider four closely related points: first the degree of freedom we accord the jury on damage issues; second, the light that is thrown on the existing law of damages when, so to speak, it is held up against the mirror of jury equity; third, the role of damages both as an index of the propensity of jurors with different backgrounds and experience to see the same matter in different ways, and also its role as a kind of solvent that makes jury consensus possible

⁴ For a brief report, see KALVEN, *REPORT ON THE JURY PROJECT*, CONFERENCE ON AIMS AND METHODS OF LEGAL RESEARCH 155, (University of Michigan Law School 1957). By use of post-trial juror interviews, survey, and experimental jury techniques the project has been studying various aspects of the American jury system, with special emphasis on jury decision making behavior. The results will be reported out over the next two years or so in a series of volumes. It is important to emphasize that our research methods can give only an approximation of actual jury behavior. The post trial interview with jurors is subject to inaccurate and incomplete recall; the experimental jury technique involves behavior on mock cases. There is therefore a margin of error on what is reported here as jury reaction. But we are persuaded that the evidence from these indirect approaches is plausible enough to warrant discussing it seriously as indications of actual jury behavior.

in the deliberation process itself; and finally I should like to touch briefly on the differences between judge and jury in deciding damages questions.

I

The freedom and discretion of the jury on issues of damage is in many ways like that of the jury on any issue. It derives first of all from the institutional arrangements under which the jury is permitted to deliberate in private and to report its decision out by general verdict.

Further the cardinal premise of common law personal injury damages is that they be not limited by schedule but be computed *de novo* for each individual case. There is in brief no standard man, no reasonable man afoot in the law of damages.⁵ Joined with this premise is the companion notion that it is the function of tort damages to make the plaintiff whole: he is not, that is, to bear any part of his accident loss himself, if there was a legally wrongful accident.⁶ It is this premise in particular which Professor Jaffe bravely challenges, but so long as the system accepts these two premises there cannot be many specific rules of damages. And the jury is of necessity left free to price the harm on a case by case basis.

The court's opportunities for control of the jury on damages are therefore severely limited. Its basic device is the general damage instruction itself which can do no more than convey to the jury the large headings under which it may award damages. Since these are so broad the chief message of the instructions to the jury is to tell them how free they are.⁷ Beyond this the court can only rarely control by excluding evidence or by withdrawing an item of damage from the jury. And finally there is its power to set aside excessive or inadequate awards. The practical trick of using additur and remittitur has given some possibility of control here, but it is today the recognized practice to use that power sparingly indeed.⁸

Perhaps this has been said too quickly. It is true that to price a punch in the nose or a broken leg is at first blush a difficult value judgment. But the law appears to avoid the impossible here by breaking the loss components down into subordinate questions of fact as to medical

⁵ This is slightly overstated. "Reasonableness" does appear in the rules as to medical loss and the rules as to the duty to mitigate damages.

⁶ Again, this is a slight overstatement to the extent that lawyers' fees and interest are to be considered part of plaintiff's loss.

⁷ Yet it is error to omit the instruction. *Benedict v. Eppley Hotel Co.*, 159 Neb. 23, 65 N.W.2d 224 (1954).

⁸ There is a useful collection of cases in which damages were challenged on appeal as excessive in a lengthy note in 16 A.L.R. 2d 3 (1951). The note covers all cases other than death actions over the decade 1941-1950. In only 297 of the 1339 cases in which excessive damages were appealed was the award modified. On appellate control generally, see Miller, *Assessment of Damages in Personal Injury Actions*, 14 MINN. L. REV. 216 (1930); Jaffe, *supra* note 1.

expense, economic loss, and pain and suffering. Medical expense and economic loss do have some objective reality but the warrant to add pain and suffering gives the jury immediate freedom to price the injury subjectively. And where, as is so often the case, there is an issue not only of accrued loss but of loss in the future the facts as to medical expense and economic loss become enormously more ambiguous. And again it is only with the wage earner that economic loss is reasonably clear. As soon as the claimant is a proprietor, a housewife⁹ or a child it is apparent that the jury's task is substantially less limited by objective data. The upshot therefore is that the ambiguities of damages as fact issues add several degrees of freedom to the jury.¹⁰

If one is tempted to read reasons into institutional arrangements, as I confess I am, one suspects that the law recognizes that the computing of damages involves a complex value judgment as well as a literal determination of fact. And that with damages as with negligence itself the law intends the jury to legislate interstitially, to fill out the vague general formula. On this view the jury's freedom and discretion is not by default but by preference—preference for the community sense of values as the standard by which to price the personal injury. And on this view the jury's role in setting personal injury damages is not so different from its role in setting general damages in defamation.

Could the jury's freedom and autonomy over damages be reduced without a drastic change in the system? Let us take a second look at the usual damage instruction. Today it tends to be a long complex sentence or two. My impression is that it could be more effectively communicated so that the jury became more conscious of its assignment to compute damages by first ascertaining a series of component sums. But I am not at all certain just what effect this would have on the jury, if any. It is a major characteristic of the jury's approach to damages that it does not much concern itself with the damage components as an accountant might but searches rather for a single sum that is felt to be appropriate. Whether any instruction could turn the jury away from its gestalt approach to a more explicit concern with adding component sums I do not know. But I do have a fairly firm impression from our project materials that the result would be in general to increase damages rather than to deflate them. If one seriously assesses the components in a case of any

⁹ See for example, *Florida Greyhound Lines v. Jones*, 60 So. 2d 396 (Fla. 1952) affirming as not excessive an award of \$50,000 to a housewife for loss of future earning power.

¹⁰ The point is less forceful in death actions where the disability is unambiguous and pain and suffering of the survivors is officially disallowed. But here the death of wife or young child presents a highly ambiguous issue. See Note, *Damages for the Wrongful Death of Children*, 22 U. CHI. L. REV. 538 (1955). And the law treats the issue of the degree of support as a question of fact to be proved in detail in each case, even where decedent has a wife and young children and has been living with his family. Compare *Allendorf v. Elgin, J. and E. Ry.*, 8 Ill. 2d 164, 133 N.E. 2d 288, cert. denied, 352 U.S. 833 (1956).

magnitude they are likely to add up to a surprisingly large figure. I take it this is one reason why the plaintiff bar sometimes expresses a preference for the accountant type juror in a case where damages are substantial and well documented. And I would suspect also that this is one secret of the success of Mr. Belli and his colleagues—their rhetoric at the blackboard is directed to stimulating the jury to compute. Not simply sentiment but arithmetic seems to be on their side under the existing rules.

Other considerations come to mind.¹¹ It is possible that use of special verdict procedures on damages would force the jury to be more explicit in weighing the component items.¹² It is my impression that the special verdict is much less frequently used on damages however than on liability. And it is not unlikely that the jury could easily escape the special verdict control and tailor its specific damage answers after the fact so as to make them accord with the "felt" appropriate overall sum.¹³ Similarly one wonders whether radical changes in trial procedure whereby for example the jury would not be instructed on the damage issue until they had completed their decision on liability would make a difference.¹⁴ One matter that has impressed us is the sheer time gap between the time the jury hears the damage instruction and the first time they are ready to turn seriously to it in the deliberation.¹⁵

Consideration of the damage instruction suggests one other interesting point that has in recent years broken through on the appellate level. To what degree do the instructions fail to control because they remain silent? This has two aspects. First, should the court like a good teacher not only tell the jury what it is to do but also anticipate certain probable misunderstandings and negate them in advance? In two wrongful death cases we have been able to study by post-trial interview it is apparent how readily such misunderstandings can arise. In the one case the jury simply does not understand that it is not being asked to place a value as such on human life; therefore the point arises with some intensity in the deliberation that any human life must be worth at least \$5,000. In the other case where damages for loss of support were clearly substantial

¹¹ The use of impartial medical experts as in New York is in a sense another control device insofar as it reduces the ambiguity of the medical evidence. See *IMPARTIAL MEDICAL TESTIMONY*, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (1956).

¹² The project is studying the impact of special verdict procedures but chiefly in connection with liability issues.

¹³ Compare however *Hogan v. Santa Fe Trail Tr. Co.*, 148 Kan. 720, 85 P.2d 28 (1938), where the disclosure of the damage computation under special verdict made it possible for the court to scrutinize and disallow the damages awarded for plaintiff's loss of enjoyment from being unable to play the violin in the future.

¹⁴ There are of course some important practical difficulties with the procedure suggested.

¹⁵ We sometimes have the impression that a jury has only so much energy and if it is spent on the liability issue, there is likely to be "fatigue" when they finally get to damages.

the jury somehow gets the notion that damages are a sort of welfare payment based on minimum subsistence notions rather than the direct measure of loss of support.¹⁶ The propriety and wisdom of the court anticipating such misunderstandings is of course a controversial matter. I would favor it here since the general instruction standing alone seems to expose the jury to needless misconceptions and nothing more.

The second aspect of the "silent" instruction is more familiar. Several important and clear damage rules are normally kept from the jury altogether. Thus they are not told that his lawyer's fees are not part of plaintiff's damage; they are not told that interest is not to be awarded from the time of injury; they are not told that the award is not subject to federal income taxation.¹⁷ The law on these points is perfectly clear—in fact it is ironically the only clear part of damage law. The non-disclosure of the law to the jury raises an obvious policy dilemma. Undoubtedly in part the non-disclosure stems from a suspicion that the instruction would only sensitize the jury and stimulate them to do something they otherwise might not do—a suspicion that our study suggests is well founded.¹⁸ And in part it stems, I suppose, from an ambivalence toward the rules themselves. We are not so sure how we feel about the plaintiff paying his attorney out of his award. And as with contributory negligence we may not mind too much the jury eroding the rule¹⁹ as a crude de facto reform.

Another detail is suggested by a recent English case.²⁰ Here the judge was trying the issue without a jury and the question arose as to the propriety of his considering, as precedent, awards in other comparable cases. The trial court thought this improper. The reviewing court thought it might prove helpful to the trial judge if done in moderation, but limited its view to bench trials. The court went on: "It may be asked: 'Why should a judge have something before him which a jury would not have?' I am not sure there is any good reason, except perhaps, that if jurors, new to the task, are called on to assess damages in a case such as this, the more one can keep their minds directed to the actual issues the better." Perhaps it is hard to escape the conclusion of the English court but once again the result is to add a degree of freedom to

¹⁶ This had interesting consequences. The jury was led far afield in its search for minimum subsistence standards and considered seriously such items as alimony, workmen's compensation, and National Service life insurance.

¹⁷ These issues are discussed in detail elsewhere in this symposium; see Nordstrom, *Income Taxes and Personal Injury Awards*, 19 OHIO ST. L. J. 212 (1958).

¹⁸ Our evidence however concerns the sensitizing effect of an instruction to disregard insurance. It is quite possible that an instruction not to award fees would "boomerang" less.

¹⁹ Whether in fact the jury does add the fee to the award, so as to make it higher than it otherwise would be, is a complicated matter; see discussions *infra* page 176. [Text at footnote 43.]

²⁰ *Waldon v. The War Office*, [1956] 1 All E. R. 108.

the jury, leaving them without even the guide that recent roughly comparable cases might offer.²¹

Finally, there is one point at least on which instructions might be much improved. This is the handling of the reduction to present value formula.²² In the case of serious disability or death of a relatively young wage earner the discount is of course very substantial. The point is a notably subtle one to convey quickly to the layman not already familiar with it and we can be certain it is not conveyed by a mild reference to limiting the award to "the present value of the losses." Our study has at least one example where a serious split in the jury on damages seems to have arisen directly from the failure to make the discount point effectively to the jury. The low and high award factions, as post-trial interview disclosed, were in fact in virtual agreement separated simply by the amount of the discount. Yet neither side recognized this and they finally were forced to compromise the difference.

It is true that in a carefully tried case counsel will make the discount point and may well handle part of the jury's difficulty by using annuity tables. This raises one last reflection on the problems of controlling the jury on damages. Many trial courts tend to regard themselves as in sort of a partnership with counsel in the presentation of the case, and more particularly the law, to the jury. Able closing arguments will substantially increase the communication of the relevant law, and perhaps the chief hope of orienting the jury on damages lies with counsel. And this in turn suggests the query whether defense counsel have not despaired too much of their potential for arguing damage points with vigor.²³

II

If the jury writes the law of damages in personal injury cases what kind of law does it write? The question cannot perhaps be answered quite so bluntly. But what can be noted with almost endless variation and interest is the response of the jury's common sense equity when confronted with the formal legal rules. To paraphrase Justice Holmes, the jury provides a kind of legal litmus paper for testing and

²¹ The jury does have an informal sort of precedent supplied by jurors with prior experience, by reading of cases in the newspapers, and by the general gossip in the jury pool. The lifting of the award "ceiling" in a given locale, which has been a chief target of NACCA, is one aspect of this. The impact of the "precedent" of one well publicized high award appears to be considerable.

²² As to whether it is error for the trial court to omit the formula see *Borzea v. Anselmi*, 71 Wyo. 348, 258 P.2d 796 (1953); Note, 32 NEB. L. REV. 583 (1953).

²³ For example, our experimental jury work has studied in detail the effect on awards of changes in the *ad damnum*. The results suggest that defense counsel may perhaps be missing a trick in not offering a competing figure for the jury to take with them into the deliberation.

illuminating the policy dilemmas concealed in the general personal injury damage formula. The jury is the most interesting of the critics of the law.²⁴ What emerges are not so much totally new points as old points seen with a fresh emphasis. For the truth seems to be not that the jury is at war with the law but that its views are somewhat askew the traditional legal norms. The jury agrees wholly with much of the law; but at times it makes distinctions the law chooses to ignore and at times it ignores distinctions the law chooses to make.

The first point that impresses is simply how difficult the job really is. The jury almost always is asked to reach decision on imperfect, incomplete and conflicting evidence. And to a stunning degree this is true where future damages are claimed in the personal injury action. Here the jury is asked to guess the future. How long will plaintiff live? How quickly and how fully will he recover? How long will he need medical treatment? How long will the pain last? How much will the dollar be worth ten years from now? This ambiguity, as we have said, greatly increases the jury's freedom and affords them the chance to use their special equities, but it also disturbs them to decide so much of a man's future fate. And more than one jury has been puzzled as to why the future cannot be left in the custody of the court to be adjusted as the future events require much in the fashion of alimony payments. In any event, the jury reminds us that one of the great architectural rules of the personal injury damage law is the rule that the whole controversy must be disposed of now, once and for all.²⁵

Almost every familiar rule appears immediately more arresting when seen as the jury struggles with it. Take first a rule which rarely reaches appellate articulation but which faces the jury in virtually every case. The rule is that issues of liability and issues of damage are totally separate. If the trier is persuaded that a preponderance, however narrowly, favors liability he is then to award the full damages proved. He is not, that is, to discount damages because of his doubts as to liability. And equally, in a negligence case at least, he is not to increase damages because of his view of the degree of fault in the defendant's conduct. If we imagine for a moment a series of cases in which the facts as to damages remain identical but the facts as to liability range over the full

²⁴ Occasionally a court will listen explicitly to the jury criticism and use it as a reason for changing its rule. Thus in *Vascoe v. Ford*, 212 Miss. 370, 54 So.2d 541 (1951), the Mississippi court in changing its rule as to disallowing damages for disfigurement said in part: "It is frequently said that our juries are prone to disregard the rule as heretofore established in this state and award damages for physical mutilation irrespective of the law; such an attitude is but proof of the fact that the sense of justice of the average man revolts against the rule."

²⁵ Compare *Slater v. Mexican National Ry. Co.* 194 U.S. 120 (1904), a decision by Justice Holmes holding it improper to permit an American jury to commute to a lump sum the periodic payments for support to survivors in a death action under a Mexican procedure analogous to alimony. To do so, he said, "would be to leave the whole matter a mere guess."

and rich possibilities of negligence,²⁶ the legal view is that the award should be constant throughout the series. The jury's view is that these may be significantly different cases.

In a case such as *Fuentes v. Tucker*,²⁷ an echo of the problem may reach the appellate court. Here in a wrongful death action the defendant admitted liability and sought unsuccessfully to keep out of the trial the facts as to liability. On appeal the admission of this evidence was challenged as error. The majority of the California court speaking through Justice Gibson held that such evidence, except as it might bear on damages, was irrelevant and its admission error, but affirmed the judgment for the plaintiff since there was no evidence that the award itself was excessive. In a concurring opinion Justice Carter with his usual vigor disagreed that it was error at all and went close to the heart of the matter. His statement is worth somewhat lengthy quotation:

The effect of the majority holding in this case is to deny to an injured person the benefit of presenting to the trier of fact the entire factual situation surrounding the accident out of which the injury arose. It cannot be denied that either a jury or a trial judge is more disposed to award a substantial amount of damages in a case where the defendant is shown to have been guilty of gross negligence and his conduct was such as to indicate a reckless disregard for the safety of others, than where the negligence amounted to only an error in judgment. The present holding will make it possible for a defendant who has been guilty of the most heinous kind of reckless and wanton conduct, including intoxication, to conceal from the trier of fact the extent of his culpability, and thereby gain any advantage which might flow from the absence of such disclosure. Theoretically and technically, and judged by academic standards, this practice may be justified, but when gauged by actual experience in the administration of justice it favors the worst offenders by permitting them to escape from a larger award of damages which the trier of fact might feel justified in awarding if the entire picture were presented. This does not mean that a person injured as a result of the negligence of another should receive more damages because his tortfeasor was grossly and wantonly negligent than another with like injuries whose tortfeasor was only slightly negligent. But it simply recognizes the human tendency to weigh liability against culpability. Since the law must be administered by human beings, the effect of this tendency must be considered as incidental to its administration. To argue to the contrary requires a denial of the obvious.

Therefore, if I were disposed to hold, contrary to the

²⁶ One of the strengths of the experimental jury procedure is that it provides a technique for doing this.

²⁷ 31 Cal.2d 1, 187 P.2d 752 (1947).

weight of authority and the long settled rule in this state, that it was error for the trial court to permit plaintiff to prove the facts relating to defendant's negligence, I would be required to hold that such error was prejudicial and compelled a reversal of the judgment. This conclusion would be required because of the probability that the damage award was increased as the result of the evidence erroneously admitted. If it cannot be said that the effect of such evidence was to increase the award of damages in this case, it likewise cannot be said that such evidence would have the effect of increasing the award of damages in any case. It must necessarily follow that the admission of such evidence could not be prejudicial in any case, and to hold its admission erroneous is as idle as fighting a windmill.

Who has the better of the debate? Is the plaintiff entitled to the full measure of jury justice or is he entitled, when control is feasible, only to what the formal rule allows? I think Justice Carter is right about the fact of jury behavior in such matters. And the argument for his policy conclusion is that since the plaintiff has of necessity this jury bonus in the majority of cases it is discriminatory to deprive him of it only in the occasional case. In any event once more we have the familiar problem. The rule is clear that punitive damages are not allowable in the ordinary negligence case and I would suppose that Justice Carter would agree that it is error to instruct a jury that they may be given. Yet we are not so sure how we feel about the rule, and once again may be willing to have the jury modify the rule *sub rosa*.

The point is at least as interesting when the shoe is on the other foot. Presumably a plaintiff with sound damages and doubtful liability might attempt to stipulate damages and seek to contest only liability to prevent the jury from discounting damages. In all likelihood this is the far more frequent problem for the jury; and our evidence in a variety of ways suggests that the jury does discount. At times the discount may reach the appellate court when it is the product of a compromise between jurors favoring no liability and jurors favoring liability with substantial damages. Occasionally the damages may be clear enough to make it evident that the verdict must have been reached by compromise. The court may then find the verdict bad either because inadequate or because the result of so naked a compromise. But it is our impression that in many cases the discount results from something more subtle and impossible to detect in the verdict. The jurors individually and within their own minds may simply fuse the liability and damage issues sufficiently to shade their estimate of the damages.

And finally and frequently the point may arise not because the jury is so doubtful about defendant's conduct but because it feels that someone else was also at fault and that the defendant should not bear the entire burden. This is the source of its behavior when in the teeth of

the contributory negligence rule²⁸ it nevertheless finds for the plaintiff but finds less. And this is the route by which it not infrequently reacts to the rules against imputing negligence. It does so not by a logic directly challenging the rule but by discounting defendant's burden because he was not totally responsible. Thus the jury law may look a good deal different than the formal rule—and, it is important to note, not always in the direction of favoring the injured victim.

We come then to a point of some general jurisprudential interest. To what extent could the law, if it would, recognize and legitimate the jury's rule in these matters? Where contributory negligence is in issue the law can do so by adopting a comparative negligence formula. But it can hardly write a formula that would accommodate the other distinctions the jury sees—the subtle gradations of moral fault in defendant's conduct or the ambiguities in the basic evidence itself. And as to imputed negligence we may again have the jury reaching a tolerable compromise between the harsh old rule that barred the innocent plaintiff altogether and the modern rule that perhaps ignores too much the reality of the family as a unit in litigation.²⁹

What has been said already makes it evident that the jury also has a tendency to apportion fault and hence damages among tortfeasors—that in brief the old common law rule is as contrary to common sense as it has long been thought to be. Thus in one of our experimental jury sequences which involves two defendants, the jury has been known to ask if it could not award \$5,000 against one defendant and \$70,000 against the other. Certain of the modern apportionment statutes would legitimate the jury's sense of the equities. But in the absence of such legislation the jury can "apportion" only when the other tortfeasor is not party to the suit.

What is so impressive about the jury's equity often is that its view is in fact the law in another state or country or is at least a reform proposal that has articulate spokesmen in the literature. And where it is not, the reason is simply that the equity is too subtle to be codified.

Many other examples of the jury's polite war with the law could be offered. We touched on several in section I: the jury reaction to fees, interest, and taxes are obvious examples. Let me consider briefly a few others. The first is the jury response in the death action of a young child. Today when the labor value of a child is likely to be negligible and the costs of raising him considerable the harsh fact is that strict obedience to the legal rule means no damages. Yet the death of a young child must be the most serious of all personal injury damage. Once again we reconcile the formal rule with our conscience by relying on

²⁸ Our data suggest that the jury is not so simply hostile to contributory negligence as a defense as seems to be popularly supposed.

²⁹ But see the interesting case of *Nichols v. Nashville Housing Authority*, 187 Tenn. 683, 216 S.W.2d 694 (1949), where in an action for the death of a child the negligence of the mother was imputed to the father so as to bar both.

the jury to not follow the rule fully. And the jury appears to use some discretion. It does not attempt the heroic task of paying the parents fully for their grief; it distinguishes clearly between killing the child and permanently disabling him. But it does honor the parents' grief somewhat. And once again this is perhaps a quite tolerable solution of a difficult policy point on which we are understandably reluctant to legislate.³⁰

The second example is the collateral benefits rule. It is widely recognized of course that this poses a problem to which there is no altogether satisfactory solution.³¹ But what evidence we have suggests that the jury does not like the rule. Their plaintiff sympathy does not extend to compensating the plaintiff for a loss which some other source has already made good. And they recognize more instances of the issue than does the formal law. In another of our experimental cases the plaintiff is injured while driving as a passenger in her employer's car. The suit is against the driver of the other car and there is little to suggest negligence on the employer's part. Yet a frequent theme in the experimental jury deliberations is the likelihood that the employer will do something for the plaintiff if she cannot work as fully as before and that this "something" ought to be considered in estimating how much the defendant should pay. A similar notion appears in cases we have studied by post-trial interview where an elderly person with adult children has been injured. Here the jury looks in part to the children to supply support almost as though the plaintiff had accident insurance. And then there is the case of the attractive young widow whose damages were reduced because the jury found her attractive. Their view as disclosed in interview in brief was that a girl that attractive would have no trouble in remarrying and if she did not remarry it was pretty much her own fault and a failure to properly mitigate damages.

The third example is closely related. It is the obverse situation where the plaintiff has a family to support. The law is clear that, death actions apart, the tort is to the plaintiff and not to his family but the jury is likely to keep the family very much in mind. It is our impression that where the facts as to liability and damages are ambiguous, damages are likely to vary in accordance with the number of dependents looking to the plaintiff for support. And this may suggest one source of the jury's coolness toward contributory negligence as a total defense. They may often see it as imputing the plaintiff's negligence to his family—a point which has been explicitly noticed by commentators where the plaintiff is

³⁰ See *Hord v. National Homeopathic Hospital*, 102 F. Supp. 792 (D.C.D.C. 1952) affirming a verdict of \$17,000 for the death of a three day old child; and see, Note, 22 UNIV. CHI. L. REV. 538 (1955).

³¹ See the excellent discussion in James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U. L. REV. 537 (1952) and in Note, 63 HARV. L. REV. 330 (1948).

killed and the question is whether his negligence bars the claim of his survivors.³²

I have not talked as yet about two other widely discussed examples: pain and suffering, and insurance. Briefly our impression is that the jury is less responsive to pain and suffering than popularly supposed. Its chief importance may well be in cases where the accident was real and serious but where the other damages do not somehow quite add up. Reverting again to data from the experimental jury, we have instances where the degree of permanent disability is very difficult to assess although the injury was genuinely painful. Here a juror sometimes argues for a given total by the twin position that either the disability may turn out to be serious in which case the sum is justified or if it does not then no injustice is done in treating the sum as recognition of the pain and suffering.

Consider for the moment the well known *McNulty* case³³ where the California Court affirmed a verdict of \$100,000 on behalf of a double amputee who made a quick recovery and was restored to his former job, incurring special damages of only \$3,000. The court justified the verdict as an award for impairment of earning power since a man so handicapped might not fare so well in the future whatever his present position. Mr. Belli reads the case as an award "solely for pain and suffering."³⁴ I would incline to guess with Professor Jaffe however that this is an example of the jury reacting not to explicit pain and suffering but simply to so gross a violation of plaintiff's bodily integrity. I appreciate the thrust of Professor Jaffe's carefully and sensitively stated challenge to the premise of such decisions. And perhaps the award is excessive. But as long as we have a system of personal injury damage awards it would, I think, seriously disturb us to place the plaintiff's damages at \$3,000. And I will add the brave guess that had plaintiff's objective losses been \$50,000 he would not have recovered appreciably more.

Finally turning again to Professor Jaffe's heroic thesis that it is unsound to recognize pain and suffering as a head of damages, I would suggest that an explicit change of the law to deny such damages might not affect jury verdicts very much. The situation might well turn out as it has with the death of the young child. It is not likely to matter too much in the normal case where there are serious other damages; and in the special case like *McNulty* we are not likely to have the courage to say the jury would be wrong in blinking at the rule.

Finally a word about the jury and insurance. Of all the points of "jury law" this has long been the most widely recognized. There is familiar law on the propriety of insurance questions on voir dire and on

³² Nourse, *Is Contributory Negligence of Deceased a Defense in a Wrongful Death Action?* 42 CALIF. L. REV. 310 (1954).

³³ *McNulty v. Southern Pacific Co.*, 96 Cal. App. 2d 841, 216 P.2d 543 (1950).

³⁴ BELL, *THE MORE ADEQUATE AWARD* 24 (1952).

admissibility of evidence of insurance for limited purposes during trial. In states like Texas and Tennessee there are even precedents that the mention of insurance in jury deliberations may impeach a verdict.³⁵ Certainly the prevalence of insurance has affected the thinking of everyone about tort and the project will report in some detail about its impact on the jury. Thus there is evidence suggesting that the lawyer strategy on voir dire does not work; most of the jury do not understand the point of the insurance questions. But they think there is insurance anyway. There are interesting suggestions that some jurors, echoing as it were Professor Ehrenzweig,³⁶ see a kind of negligence in the failure to insure. There is evidence that the silent instruction on insurance leaves the jury in the dark as to the propriety of considering it. There is the appearance from time to time of the juror who is explicitly concerned with the level of insurance premiums.

But the points I should like to underscore here are three. First that liability insurance, at least in auto cases and for the business enterprise defendant, is now so frequent that its impact on the jury is probably reduced. Second that it may have a somewhat different relevance for jury thinking on damages than for their thinking about liability. There is the arresting suggestion in some of our data that the effect of insurance may be not so much to inflate damages as it is to persuade the jury that the full loss be placed on the defendant. That is, doubts as to insurance are likely to cause the jury to award less than what it regards as the adequate award, out of regard to the burden it places on the defendant. And finally there is the underlying premise which an occasional juror puts into words. Insurance and ability to pay are relevant only in the case of real doubt. There is no simple jury rule that the insured defendant cannot win. Rather it is that where there is doubt and consequently the risk of injustice and error in deciding the case either way, it is better to risk error against the insurance fund than against the injured plaintiff. The result therefore is a subtle shift of the burden of proof, particularly on damage issues, to the insurance fund.

This last observation invites a strong note of caution as to what has been said in this section. I have been reporting primarily on what the jury *talks*³⁷ about when confronted with the various damage issues. For several reasons such data although relevant must not be taken too literally as prediction of jury decision. On many points we have at most sug-

³⁵ *Marshall v. North Branch Transfer Co.*, 166 Tenn. 96, 59 S.W.2d 520 (1933); Green, *Blindfolding the Jury*, 33 TEX. L. REV. 157 (1954); Gay, *"Blindfolding" the Jury: Another View*, 34 TEX. L. REV. 368 (1956); Green, *A Rebuttal*, 34 TEX. L. REV. 382 (1956).

³⁶ Ehrenzweig, *Assurance Oblige*, 15 LAW & CONTEMP. PROB. 445 (1950).

³⁷ A caution is again in order. Our evidence as to how the jury actually sounds in the deliberation comes primarily from the experimental jury work and to a lesser degree from post trial interviews. We would emphasize once again that it is only an approximation of the way the jury actually talks and behaves.

gestive anecdotes, not systematic data. Again what has been reported is almost always the reactions of some individual jurors, not the consensus of the jury as a whole and it is the jury as a whole that makes the decision. The give and take of the deliberation process and the requirement of a group decision operates to limit greatly extreme tendencies to do equity as one or two jurors may see it. The jury is likely to be more conventional and in accord with the law than is the individual juror. As we shall note more fully in the next section, jury discussion is highly fluid, arguments are frequently rationalizations or rhetoric or face saving gestures making possible changes in position and there may be a wide gulf between the way the jury talks and how it finally decides. The quest especially in damages is, as we have said, for the felt appropriate sum. An argument about pain and suffering or children to support or fees or insurance may supply a useful defense of a position. But if that argument is made unavailable, another is likely to take its place and the damage sum remain unchanged. And to return to the moral of the insurance example, the jury's special equities are likely to come into play only where there is a gap of ambiguity in the facts, where that is the controversy is close to indeterminate. Then the jury may utilize the freedom created by the doubt to add some equities the law ignores.

III

Our third general point is to look at the damage issue somewhat less from the viewpoint of the lawyer and more as the student of behavior would see it. The jury project has been a collaborative effort by lawyers and social scientists and here we pick up their emphasis. The difference is chiefly one of emphasis however since their points will have their legal counterpart.

The first general point is what we might call the variance in jury verdicts. The experimental jury technique has made an important contribution here by making it possible to try the same case several times and compare the results. This is an opportunity the legal system can very rarely provide and even, when it does it is always a somewhat different case on retrial. The key point then is that if we run say ten trials of the same personal injury damage case we are very likely to get ten different results. And the experimental jury results provide therefore direct experience with the range of possible verdicts in a given case and also some sense of their relative probability.³⁸ This underscores the familiar point that jury law is unstable and uncertain, and more important it provides the proper intellectual model for thinking about jury decision making. A jury verdict is simply one of a series of possible

³⁸ It is probable that the experimental jury tends to exaggerate the variances somewhat for two reasons. First, our experimental cases may be more ambiguous on their facts than many actual jury cases; second, our experimental juries, although drawn from actual jury pools, have not been subjected to voir dire and include therefore relatively more jurors with extreme views.

verdicts for the single case.³⁹ And this in turn means that at most we should talk of *averages* when we talk about jury tendencies. The first point then is simply that this is the way it really is and that this variance is somewhat concealed from our normal view of the jury by the fact that we try the case only once.

But from a slightly different standpoint this averaging process is quite familiar to the trial lawyer. It makes explicit what he must in part be considering when he evaluates a case for settlement.⁴⁰ If he says a case is worth \$20,000 he means not that a jury will invariably give \$20,000 and, if he is very thoughtful about it, not that any jury will give \$20,000. He means rather that the average of a series of verdicts in this case will be around \$20,000 and that therefore he runs the smallest risk of error in settling as against trial if he sticks to his \$20,000 figure. Our first experimental case supplied a vivid example of this. We had taken our script from an actual case which was settled just before verdict for \$42,000. We ran ten experimental trials of the case; the verdicts ranged from \$17,500 to \$60,000 with only one \$42,000 verdict and only one \$40,000 verdict. Yet the average for the ten cases was \$41,000.⁴¹

The settlement process in personal injury cases is an integral part of the total decision making institution; the vast majority of cases are disposed of by the settlement mechanism; and jury law controls not only the small minority of cases finally tried to verdict but those settled as well since the yardstick for settlement is the expectation of jury decision. And in weighing such expectations the bar more or less explicitly recognizes that they are dealing with the average verdict in the individual case.

The source of this variability in verdict is two-fold. It results from the ambiguity of the facts and the law, which makes for difference in viewpoint, and from the enormously wide public from which the jury is recruited, which makes it likely that those different viewpoints will be differentially represented on different juries. In brief, particularly on issues of personal injury damage, the jury system puts to the public precisely the kind of question on which differences in background, temperament and experience are likely to produce differences in opinion. Or to put this another way, it is still regarded as a somewhat refreshing point to observe that changes in the personnel of the United States Supreme Court may have something to do with changes in its decisions. But with

³⁹ The project has less direct evidence on the variance of bench trial decisions, but it would appear that the model is equally correct for the individual judicial decision.

⁴⁰ Variance also provides the key rationale for the doctrine of *res judicata*; see Currie, *Mutuality of Collateral Estoppel*, 9 STAN. L. REV. 281 (1957).

⁴¹ This raises the amusing point that a lawyer who refuses to settle say, for \$20,000 and is hit by a \$40,000 verdict may in fact have been more right than his opponent. It may however be small comfort to him, or to his client, to realize that had the case been tried over and over to eternity the average of all verdicts would approximate \$20,000.

the jury we take for granted that personnel as well as rule and tradition make a difference.

From the viewpoint of the social scientist the jury offers a rich possibility for exploring further the correlations between background and opinion, a topic of wide general interest to him. We have talked thus far of the jury's sense of equity as though it were a single uniform sentiment interestingly different from the legal norm. But the truth of course is that so heterogeneous a population as the American jury has a great variety of sentiments on any given issue. And it is therefore pertinent to see what can be learned about what kinds of people have what kinds of views. Roughly we can break our inquiry into two stages. First, what kind of background and experience will dispose the individual juror to a given view at the end of the trial and before the deliberation begins; and second what kind of jurors will be influential in the deliberation process where the view must weigh if it is ever to matter to the result.

This is not the place to detail the results of our inquiry. But this much might be emphasized. First, we find repeated correlations between some background factors such as ethnicity and the jury's viewpoint on damages in the particular case. Second, as with the social sciences in general at this stage of their development,⁴² the factors which correlate best are the demographic variables like ethnicity, occupation, income, etc. But these are relatively crude indices and do not contain on their face the explanation for the correlation. Our quest for deeper factors such as personality traits or basic sentiments which would both explain more and correlate more tightly has been only modestly successful. Third, we are again speaking only of averages; there is great variation within any general category of individuals. Thus on the average, business men of Scandinavian origin tend to be conservative on damages, but this or that individual Scandinavian business man might be enthusiastically pro-plaintiff. Fourth, some juror types who are most strongly pro-plaintiff or pro-defendant are most easily influenced to change their views in the deliberation process. But again the tracing of juror influence in the deliberation is a subtle and difficult matter. Fifth, we have made a special study of the regional variations in awards which permits us to make a fair map of the award "temperature" in the United States. But once again the explanation as to why different regions differ so much is hard to come by.

It should be abundantly clear by now that what we talk of as correlations between demographic variables and juror pre-deliberation bias is altogether familiar to the trial bar however alien the vocabulary. The institution of voir dire examination is the lawyer's version of the

⁴² See STOUFFER, *COMMUNISM, CONFORMITY AND CIVIL LIBERTIES* (1955); Blum and Kalven, *The Art of Opinion Research: A Lawyer's Appraisal of an Emerging Science*, 24 U. CHI. L. REV. 1 (1956).

same point. In his exercise of peremptory challenges he is practicing the art of the social scientist. One phase of our study is therefore concerned with finding out what rules and hunches the lawyer plays in actual practice and how closely these check out with our own results. Suffice it here to note that the lawyer has observed well and it is somewhat a matter for mutual congratulation that our results are so close to his; similarly our study of regional variation has its obvious counterpart in the migratory tort suit and here again the bar and we are largely in agreement.

Men differ as jurors not only because of the differences in their backgrounds but also because of the differences in their experience. One of the most interesting chapters of the jury study concerns the juror's use of extra-record information in the deliberation. Whatever the law's interest in keeping the trial record aseptic, it cannot in fact prevent the juror from augmenting it out of his own experience. Thus the record is enlarged in the jury room by juror testimony. And the documenting and inventorying of this addition to the record is a fascinating business indeed. One recurring instance of this has special relevance for the damage issue. It concerns the juror's reactions to medical testimony and to illness in general. It may be as simple as the juror's identification with the injured plaintiff where he himself or a close friend or relative has experienced a comparable injury. The bar has recognized this in its aphorism that the risk of having the aged and infirm on the jury is that the defendant will have to pay for their ills as well as those of the plaintiff. It may take the form of grave suspicion of ills less obvious than the broken leg, on the general view that no one feels altogether healthy anyway, or more concretely as in the case of a railroad man plaintiff where several jurors knew railroad men intimately that no real railroad man would complain about such minor ills. Or the very vagueness of the ailment may turn in the jury's eyes into a guarantee of authenticity as in the case of a back ailment where all the medical testimony tended to show that the doctors could find nothing organically wrong. In one such case which we studied through post-trial interview a juror indicated that his mother had complained of such an ailment for thirty years, that no doctor had been able to find anything wrong, *and* that he was certain his mother was not a hypochondriac. The jury faced with the delicate choice of believing the plaintiff of charging the juror's mother as a hypochondriac sided in the end with the plaintiff.

There remains then the pooling of individual juror views in the deliberation process to yield the group verdict. Here again the jury involves an important area of research in contemporary social science—the study of small group behavior. And here the blending of the lawyer's perspective with its emphasis on the logic of argument with the social scientist's perspective with its emphasis on the social process of the group has proved a considerable but a rewarding job. The lawyer is likely to view the deliberation as simply a formal debate; the social scientist is

likely to view it as group problem solving where everything but the content of the problem is of interest.

The dynamics of group behavior in the jury room is too complex a story to attempt here. The great point is that a jury verdict is a group product; that the jury is not simply an atomistic electorate, but must work to a solution which is at least tolerable to all twelve. One result is that the filtering of individual eccentricity through the group process furnishes a major safeguard in the jury system. It is not merely that twelve heads may be better than one but that a verdict hammered out as a group product is likely to have important strengths.

We have anticipated in the prior discussion several of the most important points about the jury's behavior when it turns to the damage issue as a group. The cardinal point is that the quest is more for the appropriate sum than for the summation of the specific components. The impression, as already noted, is one of considerable fluidity in argument—the sum is more important than the arguments advanced on its behalf. If this argument is disallowed, another will take its place. And one important reason the jury can reach agreement is that it does not try for agreement on all the subordinate premises. Juror A may rate pain and suffering more important than Juror B, and Juror B may take disability as more substantial than Juror A. They will air these differences, to be sure, in the deliberation but they will not insist on their resolution so long as by whatever route they can agree on the overall sum.

One illustration of this will have to suffice. We touched earlier on their view as to lawyer's fees as damages. Do they actually award fees? The answer is not simple. They frequently discuss them in the deliberation; they see no impropriety in so doing. They are frequently well informed, although not always, about the level of contingent fees today. Does this then mean that awards are higher by the amount of the fee? We seriously doubt it.⁴³ First we virtually never have a jury which after agreeing on the proper damage figure then decides on the fee as a group and adds it. We have some property damage cases where the damage is

⁴³To balance the impressions here I should report a jury anecdote I recently heard from a lawyer. The particular jury is said to have begun its deliberation by deciding first on the lawyer's fee and then multiplying it by three to get the damages.

Occasionally an appellate judge will himself be explicit about lawyers' fees when he is appraising whether a verdict is excessive or not. In *Renuert Lumber Yard, Inc. v. Levine*, 49 So. 2d 97 (Fla. 1950) where the court entered a remittitur of \$15,000 on a verdict of \$75,000, Judge Hobson dissenting, said in part: "Moreover, although there is no legal basis for the inclusion of an attorney's fee in the judgment it is a matter of common knowledge that in personal injury actions lawyers do not customarily perform services for the plaintiff gratuitously. As a practical proposition it is indeed probable that after paying for the services of his attorney appellee would have little, if any, of the \$30,000 left. . . . Such circumstances cannot be ignored by the writer in performing his part of this appellate court's duty to determine whether the judgment is so grossly excessive as to shock the judicial conscience."

more objectively set and in these the jury does not consider the fee. And we have a variety of suggestions that the fee point is used simply as a device in argument to facilitate agreement. Perhaps the most vivid illustration occurs in an experimental jury deliberation where a majority of jurors finally reach agreement on a sum which does not reflect fees. In an effort to persuade one of the hold-out low award jurors the point is made for the first time. The hold-out agrees he has overlooked fees and raises his figure accordingly. An over-logical member of the majority then asks about the majority adding fees to their award and is quickly and decisively rebuffed.

The miracle of the jury is that it is somehow able to reach agreement despite the divergent views with which it enters the deliberation. This is the result of many pressures including a great reluctance to fail to do their job and have the jury hang. In part it is the result of a decent respect for the opinions of others on matters where certainty is hard to come by. In part it is the result of a subtle shift in their own perception of the facts as the deliberation continues. We find with high frequency that a genuine consensus has been reached at the end with the jurors now preferring the jury verdict to their original position. And finally in part it is the result of negotiated compromise when argument can go no further.

We come then to the quotient verdict. Is the damage award simply the quotient of the twelve individual answers? Here again the answer is complicated. The final awards will not infrequently come close to the original pre-deliberation averages for the group. But this will often be the result even though a quotient is never taken. There is a natural tendency for the extremes to come toward the middle as the range of positions is disclosed. The jury often takes a quotient early as a guide but then goes on with its deliberation. And in the cases where the quotient is the final answer the compromise usually comes late after a serious effort to bridge difficulties by other means. The merit of a compromise verdict is thus difficult to assess without knowing the full context of the deliberation.

In general we have concealed from ourselves the difficult position in which the formal law may place the jury. Surely there is nothing about the damage issue in many personal injury cases which makes it likely that twelve men acting seriously and in good faith can reach full agreement on it. What do we then want the jury to do? There are only two alternatives left: negotiated compromise or a hung jury. The practical jury almost always prefers the former with the interesting result that the function of the jury in the end may be not to adjudicate the case, but, as it were, to settle it vicariously.

In any event, the nature of the damage question permits the jury to behave differently than do the yes/no issues of guilt and liability. It permits the small adjustment, the slight shift, and if necessary, the full

compromise which makes the verdict possible. The damage verdict therefore is especially likely to reflect the composite view of the jury as a group and not to be the product of the single strong juror or the strong faction. Perhaps the legal system should seek some way to avoid having questions of such flexibility and indeterminacy arise, but so long as it continues to furnish them the jury would seem to provide a remarkably congenial mechanism for their official resolution.

IV

We have left to a brief postscript the consideration of the parallel performance in comparable cases of the judge. Logically perhaps, this is the first question to ask about the jury—how differently do judge and jury decide the same case. We are by no means clear on how much like the judge and how different from him we wish the jury to be. If it is too much like the judge, the jury may lose all claim to a distinctive function. If it is too little like him we are disturbed by how easily jury equity elides into jury anarchy.

The question is specially pertinent for the personal injury case where the jury is so widely thought, as jury waiver ratios indicate, to favor the plaintiff. A major segment of the jury project is devoted to a survey in which trial judges have reported on a case by case basis how they would have decided on bench trial actual cases tried before them with a jury.⁴⁴ Once again the results indicate considerably more complexity than the popular view supposes. I shall not report the data here except to note two points. First, the difference is not monolithic. While jury awards on the average are higher than judge awards, there are a surprising proportion of cases in which the judge would have given more than the jury in fact did. Second, the detailed profile of judge-jury differences obtained from the survey gives us another perspective on the jury's sense of equity and the law's success in controlling it.

The judge and jury are two remarkably different institutions for reaching the same objective—fair impersonal adjudication of controversies. The judge represents tradition, discipline, professional competence and repeated experience with the matter. This is undoubtedly a good formula. But the endless fascination of the jury is to see whether something quite different—the layman amateur drawn from a wide public, disciplined only by the trial process and by the obligation to reach a group verdict—can somehow work as well or perhaps better. And in any event in its persistent struggle to dispose of the difficult issues our legal system gives it—among which measuring personal injury damages occupies a prominent place—the jury throws much light on the ultimate issues of justice involved.

⁴⁴ The survey is based on a nationwide sample of some 700 trial judges and includes some 5000 actual jury trials. Roughly 1400 of these are personal injury cases. The results will be reported out in detail in the publications of the Project.